UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

LISA EVANS and DENISE STARKS Individually and on behalf of all similarly situated persons,	)	
	)	
Plaintiffs,	)	**TRAUGER**
	)	
v.	)	**Case No. 3:17-cv-00402**
	)	
CAREGIVERS, INC., and ROBERT DEBLASIO, individually,	)	
	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS FIRST AMENDED COMPLAINT

Defendants, Caregivers, Inc. and Robert DeBlasio, individually, submit this Memorandum in Support of Defendants' Motion to Dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. In support of this Motion, the Defendants state that to the extent that the First Amended Complaint [Doc. 16] seeks to recover overtime wages for the period prior to November 12, 2015, the First Amended Complaint fails to state a claim upon which relief may be granted by this Court, and therefore, should be dismissed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

I. SUMMARY OF ARGUMENT.

In 1974, Congress enacted amendments to the Fair Labor Standards Act that exempted employees engaged in companionship service from the overtime provisions of that law. 29 U.S.C. § 213(a)(15). In 2013, the Department of Labor published New Regulations that would remove that exemption for employees employed by third party agencies. "Application of the

Fair Labor Standards Act to Domestic Service," 78 Fed. Reg. 60454 (Oct. 1, 2013). Those New Regulations were vacated by the United States District Court for the District of Columbia on December 22, 2014. Home Care Ass'n of America v. Weil, 76 F.Supp.3d 138, 139 (D.D.C. 2014). The United States Court of Appeals for the District of Columbia reinstated those New Regulations. Home Care Ass'n of Am. v. Weil, 799 F.3d 1084 (D.C. Cir. 2015). The mandate issued from that Court on October 13, 2015. Application of the Fair Labor Standards Act to Domestic Service: Dates of Previously Announced 30–Day Period of Non–Enforcement," 80 Fed. Reg. 65646, 65646 (Oct. 27, 2015). Prior to that date, the Department of Labor issued guidance to employers delaying enforcement of the New Regulation until thirty (30) days after issuance of the mandate or November 12, 2015. "Application of Fair Labor Standards Act to Domestic Service; Announcement of 30-Day Non-Enforcement," 80 FR 55029 (Sept. 14, 2015).

Plaintiff Starks' employment with Caregivers terminated on September 11, 2015. Affidavit of Robert DeBlasio dated April 11, 2017, at ¶ 3 [Doc. 14]. Therefore, her claims are barred. Plaintiff Evans employment terminated on February 26, 2016. Id. Her claims are limited to the three-month period between November 12, 2015, and February 26, 2016.

II. ALLEGATIONS OF THE COMPLAINT.

In their Complaint, the Plaintiffs state that they seek to recover overtime compensation pursuant to Section 216(b) of the Fair Labor Standards Act. Amended Complaint [Doc. 16], at ¶¶ 1, 3, 40 – 49. Specifically, they seek to obtain overtime compensation for the three (3) year period prior to the filing of the Complaint – March 1, 2014, through and including March 1, 2017.

In support of their Amended Complaint, the Plaintiffs allege they were employed by Defendant Caregivers, Inc. as homecare workers. Id. at ¶ 3. Specifically, Plaintiff Evans alleges that she was employed as a homecare worker from July of 2015 to July of 2016. Id. at ¶ 6. Plaintiff Starks alleges that she was employed as a homecare worker from September of 2000 to March of 2016.[1] Id. at ¶ 7.

III. ARGUMENT.

PRIOR TO NOVEMBER 12, 2015, THE FAIR LABOR STANDARDS ACT DID NOT REQUIRE PAYMENT OF OVERTIME COMPENSATION TO HOMECARE WORKERS, SUCH AS THE PLAINTIFFS.

The Fair Labor Standards Act of 1938, 29 U.S.C. section 201 *et seq.* ("FLSA"), imposes an obligation upon certain employers to pay overtime to their employees. In 1974, Congress enacted amendments to the Act that exempted from the requirement to pay overtime under section 207:

> any employee employed in domestic service employment to provide *companionship services* for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary);

29 U.S.C. § 213(a)(15) (emphasis added).

In accordance with the statute, the Secretary of Labor adopted a regulation that defines the term "companionship services." That regulation states that "companionship services" are provided to persons who are elderly or who otherwise require assistance because of illness, disability or injury. 29 C.F.R. § 552.6(a). Those services included within the definition of companionship services include:

> social, physical, and mental activities, such as conversation, reading, games, crafts, or accompanying the person on walks, on errands, to appointments, or to social events.

[1] In fact, Plaintiff Starks worked for Caregivers, Inc. from July 30, 2001 through February 26, 2016. Plaintiff Evans worked for Caregivers, Inc. from June 26, 2014, to September 11, 2015. Affidavit of Robert DeBlasio dated April 11, 2017, at Paragraph 3 [Doc. 14]. Notwithstanding this fact, the Plaintiffs did not modify the allegations contained in the Amended Complaint with respect to their dates of employment.

Id. In addition, those services include "dressing, grooming, feeding, bathing, toileting" and "meal preparation, driving, light housework, managing finances, assistance with the physical taking of medications, and arranging medical care." Id. at § 552.6(b).

The Complaint in this case alleges that the Plaintiffs acted as:

> caregivers in private homes throughout the Middle Tennessee area to provide lifestyle support such as morning care and bathing, light housekeeping, shopping, errands, meal preparation and diet monitoring, medical appointments, assistance with medications and other services for the aged, infirm, disabled and others needing assistance.

Amended Complaint [Doc. 16], at ¶ 8. Those services are services of the type included within the definition of "Companionship Services".

In 2013, the Department of Labor published new regulations entitled, "Application of the Fair Labor Standards Act to Domestic Service," 78 Fed. Reg. 60454 (Oct. 1, 2013) (the "New Regulations"). In the New Regulations, the Department of Labor proposed to remove the Companionship Service Exemption for employees employed by third party agencies. Id. at 60454-55 (amendment to 29 C.F.R. 552.109); see also Home Care Ass'n of America v. Weil, 76 F.Supp.3d 138, 139 (D.D.C. 2014).

The notice stated an effective date of these New Regulations of January 1, 2015. Id. at 60454. Prior to January 1, 2015, several trade associations representing employers with employees exempt under the Companionship Service Exemption filed a lawsuit challenging the New Regulations. On December 22, 2014, the United States District Court for the District of Columbia concluded that the Department of Labor exceeded its authority when it promulgated the New regulations removing the Companionship Service Exemption for employees employed by third party agencies. Home Care Ass'n of Am. v. Weil, 76 F.Supp.3d 138, 147-48 (D.D.C. 2014). The District Court vacated the New Regulations. Id.

The Secretary of Labor appealed the District Court's decision to the Court of Appeals for the District of Columbia. On August 21, 2015, that court issued its opinion in Home Care Ass'n of Am. v. Weil, 799 F.3d 1084 (D.C. Cir. 2015). In that opinion, the Court of Appeals found that the New Regulations were in fact a departure from past practice; however, the court concluded that the Department of Labor's actions were neither arbitrary nor capricious." Id. at 1095. The Court of Appeals therefore reversed the District Court's decision vacating the New Regulations. Id. at 1097.

On September 14, 2015, the Department of Labor issued guidance to all affected employers on the effective date of the New Regulations. "Application of Fair Labor Standards Act to Domestic Service; Announcement of 30-Day Non-Enforcement," 80 FR 55029 (Sept. 14, 2015). Specifically, the Department of Labor noted the reversal by the Court of Appeals of the decision of the District Court in Home Care Ass'n of Am. v. Weil, 799 F.3d 1084 (D.C. Cir. 2015). Id. at 55029 (Sept. 14, 2015). In addition, the Department noted that the decision would not become effective until "that court issues a mandate directing the district court to enter a new judgment in favor of the Department." Id. Therefore, the Department stated:

> the Department will not bring enforcement actions against any employer for violations of FLSA obligations resulting from the amended domestic service regulations for 30 days after the date the mandate issues.

Id. Effectively, the Department modified the effective date of the Regulations from January 1, 2015, to thirty days after all judicial proceedings are resolved.

The Court of Appeals issued its mandate on October 13, 2015. "Application of the Fair Labor Standards Act to Domestic Service: Dates of Previously Announced 30–Day Period of Non–Enforcement," 80 Fed. Reg. 65646, 65646 (Oct. 27, 2015). Thereafter, the Department of Labor announced that it would not bring enforcement actions for violations of the New

Regulations that occurred prior to November 12, 2015. Id.

During this period, the plaintiff trade associations filed a petition for writ of certiorari with the United States Supreme Court. On June 27, 2016, the United States Supreme Court denied the trade associations' petition for certiorari. Home Care Ass'n of Am. v. Weil, ______ U.S. _____, 136 S.C. 2506, 195 L.Ed.2d 839 (June 27, 2016). Issuance of the order denying the petition ended the litigation.

THE EFFECTIVE DATE OF THE NEW REGULATIONS IS NOT JANUARY 1, 2015.

In light of this history, the effective date of the New Regulations is not January 1, 2015. In the first case to consider the question, Bangoy v. Total Homecare Solutions, LLC, 1:15-CV-573, 2015 WL 12672727 (S.D. Ohio, Dec. 21, 2015), the district court held that "when the district court vacated the rule before its effective date, it became a nullity and unenforceable." Id. at *3 (citation omitted). Further, the Court noted:

> Moreover, permitting Plaintiffs to recover for a violation of the rule while the vacatur was in effect would give the rule an impermissible retroactive effect. Fernandez-Vargas v. Gonzales, 548 U.S. 30, 37 (2000). Finally, the fact that the DOL has indicated that it will not bring enforcement actions for violations that occurred before the Court of Appeals' reinstated the rule, see supra, at 2, strongly suggests that the rule should not be given retroactive effect in cases between private parties. Indeed, "[g]ood administration of the Act and good judicial administration alike require that the standards of public enforcement and those for determining private rights shall be at variance only where justified by very good reasons." Skidmore v. Swift & Co., 323 U.S. 134, 139-40 (1944); see also id. at 140 (federal agency policy statements are entitled to respect and may constitute persuasive authority).

Id. The court concluded that the effective date of the New Regulations was November 12, 2015. Other courts that have addressed this question have likewise determined that the effective date of the New Regulations was not January 1, 2015. See, e.g., Alves v. Affiliated Home Care of Putnam, Inc., No. 15-CV-1593, 2017 WL 511836 (S.D.N.Y.

Feb. 8, 2017) (October 13); Wengerd v. Self-Reliance, Inc., No. 3:15-cv-293, 2016 WL 5661972 (S.D. Ohio Oct. 3, 2016) (November 12); Jasper v. Home Health Connection, Inc., No. 2:16-cv-125, 2016 WL 3102226 (S.D. Ohio June 1, 2016) (October 13).

These rulings are consistent with the law relative to vacatur of a regulation. Generally, vacatur of a federal regulation renders the regulation void until such time as the decision is overturned. Environmental Def. v. Leavitt, 329 F. Supp. 2d 55, 64 (D.D.C. 2004); see also Alabama Power Co. v. United States EPA, 40 F. 3d 450, 456 (D.C. Cir. 1994) ("…the effect of our vacatur of the regulation is to suspend the utilities' compliance obligation pending further rulemaking by the agency."); Action on Smoking and Health v. Civil Aeronautics Board, 230 U.S. App. D.C. 1, 713 F. 2d 795, 797 (D.C. Cir. 1983) ("the term 'vacate' means 'to annul; to cancel or rescind; to declare, to make, or to render void; to defeat; to deprive of force; to make of no authority or validity; to set aside'" and "Thus, by vacating or rescinding the rescissions proposed by ER-1245, the judgment of this court had the effect of reinstating the rules previously in force.").

Other district courts had held that, notwithstanding the vacatur of the regulation, the effective date of the New Regulations was January 1, 2015. In Dillow v. Home Care Network, Inc., 1:16-cv-612, 2017 WL 749196 (S.D. Ohio, Feb 27, 2017), the district court held that the New Regulations should be enforced retroactively. In distinguishing its holding from the holding of the same court in Bangoy v. Total Homecare Solutions, LLC, the Dillow court focused on the principle that judicial decisions generally should be applied retroactively. Id. at * 2 (quoting Harper v. Virginia Dep't of Taxation, 509 U.S. 86, 97, 113 S. Ct. 2510, 2517-18, 125 L. Ed. 2d 74 (1993)). To support its argument, the

Dillow court stated that the Weil Court "did not find any new interpretation of the law that would only apply towards future DOL regulations." Id.

The Dillow court, however, ignored one crucial fact. This case is not a case about the retroactive application of a new judicial decision. This case is one of the *effect of the vacatur order* combined with the Department of Labor's decisions to delay enforcement pending completion of the judicial review process.

By vacating the regulation, the Weill court effectively entered a stay pending judicial review. By acting to delay the effective date of the New Regulations, the Department of Labor effectively issued a "delay notice." These two actions combined to delay the effective date of the New Regulations to November 12, 2015.

It is well-settled that an administrative agency possesses the power to issue delay notices after publication of a final rule. See Sierra Club v. Jackson, 833 F. Supp. 11, 28 (D.D.C. 2012); see 5 U.S.C. § 705 (postponement of effective date pending judicial review). Delay in the effective date of regulations is particularly appropriate when judicial proceedings challenging the rule are pending. 5 U.S.C. § 705 ("When an agency finds justice so requires, it may postpone the effective date of action taken by it, pending judicial review.")

In fact, the delay notices issued by the Department of Labor incorporating the date of issuance of the mandate by the Court of Appeals clearly delay the regulation pending completion of judicial review. By virtue of the Department of Labor's determination, the effective date of the New Regulations was delayed to at least November 12, 2015.

IV. CONCLUSION.

In this case, the Plaintiffs seek to recover overtime from March 1, 2014, through and including March 1, 2017. As set forth above, the Plaintiffs' claims for the period of March 1, 2014 through December 31, 2014, fail by virtue of the exemption granted for Companionship Service contained in 29 U.S.C. § 213(a)(15) and 29 C.F.R. § 552.6.

With respect to claims accruing between January 1, 2015, and November 12, 2015, the Defendants assert that the Companionship Service exemption continued by virtue of the vacatur of the New Regulations to November 12, 2015. See Bangoy v. Total Homecare Solutions, LLC, 1:15-CV-573, 2015 WL 12672727 (S.D. Ohio, Dec. 21, 2015); Alves v. Affiliated Home Care of Putnam, Inc., No. 15-CV-1593, 2017 WL 511836 (S.D.N.Y. Feb. 8, 2017) (October 13); Wengerd v. Self-Reliance, Inc., No. 3:15-cv-293, 2016 WL 5661972 (S.D. Ohio Oct. 3, 2016) (November 12); Jasper v. Home Health Connection, Inc., No. 2:16-cv-125, 2016 WL 3102226 (S.D. Ohio June 1, 2016) (October 13).

As Plaintiff Evans' employment terminated prior to November 12, 2015, her claims must be dismissed for failure to state a claim for which relief may be granted. To the extent that Plaintiff Starks presents claims for overtime wages for the period prior to November 12, 2015, those claims must be dismissed for failure to state a claim upon which relief may be granted.

Dated: May 5, 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon the following by operation of the Court's electronic case filing system:

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Dated: May 5, 2017.

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